

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF EDUCATION

In the Matter of Proposed
Rules 3525.0200-3525.4400
Governing Special Education
and 3500.1000, a Rule Governing
Experimental Programs.

REPORT OF THE
ADMINISTRATIVE LAW JUDGE

The above-entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on November 29 and 30, 1994, at 9:00 a.m. in the Sheraton Midway Hotel, Interstate 94 and Hamline Avenue, St. Paul, Minnesota.

This Report is part of a rulemaking proceeding held pursuant to Minn. Stat. §§ 14.131 to 14.20, to hear public comment, to determine whether the Minnesota Department of Education (Department) has fulfilled all relevant substantive and procedural requirements of law applicable to the adoption of the rules, whether the proposed rules are needed and reasonable and whether not modifications to the rules proposed by the Department after initial publication are impermissible, substantial changes.

Bernard Johnson, Assistant Attorney General, Suite 200, 520 Lafayette Road, St. Paul, Minnesota 55155, appeared on behalf of the Department at the hearing. The Department's hearing panel consisted of Wayne Erickson, Director of the Office of Special Education and Dr. Thomas Lombard, Supervisor of Office of Compliance and Assessment. Russell Smith appeared at the hearing on behalf of the Task Force that participated in the rule development. Fifty-six persons attended the hearing. Fifty-six persons signed the hearing register. The hearing continued until all interested persons, groups or associations had an opportunity to be heard concerning the adoption of these rules.

The record remained open for the submission of written comments for two calendar days following the hearing, to December 20, 1994. Pursuant to Minn. Stat. § 14.15, subd. 1, five working days were allowed for the filing of responsive comments. At the close of business on December 27, 1994, the rulemaking record closed for all purposes. The Administrative Law Judge received written comments from interested persons during the comment period.

The Department submitted written comments responding to matters discussed at the hearings and proposing further amendments to the rules.

The Department must wait at least five working days before the agency takes any final action on the rule(s); during that period, this Report must be made available to all interested persons upon request.

Pursuant to the provisions of Minn. Stat. § 14.15, subd. 3 and 4, this Report has been submitted to the Chief Administrative Law Judge for his approval. If the Chief Administrative Law Judge approves the adverse findings of this Report, he will advise the Department of actions which will correct defects and the Department may not adopt the rule until the Chief Administrative Law Judge determines that the defects have been corrected. However, in those instances where the Chief Administrative Law Judge identifies defects which relate to the issues of need or reasonableness, the Department may either adopt the Chief Administrative Law Judge's suggested actions to correct the defects or, in the alternative, if the Department does not elect to adopt the suggested actions, it must submit the proposed rule to the Legislative Commission to Review Administrative Rules for the Commission's advice and comment.

If the Department elects to adopt the suggested actions of the Chief Administrative Law Judge and makes no other changes and the Chief Administrative Law Judge determines that the defects have been corrected, then the Department may proceed to adopt the rule and submit it to the Revisor of Statutes for a review of the form. If the Department makes changes in the rule other than those suggested by the Administrative Law Judge and Chief Administrative Law Judge, then it shall submit the rule, with the complete hearing record, to the Chief Administrative Law Judge for a review of the changes before adopting it and submitting it to the Revisor of Statutes.

When the Department files the rule with the Secretary of State, it shall give notice on the day of filing to all persons who requested that they be informed of the filing.

Based upon all the testimony, exhibits, and written comments, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Procedural Requirements

1. On September 13, 1994, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules;
- (b) the Notice of Hearing proposed to be issued; and

(c) the Statement of Need and Reasonableness (SONAR).

2. On September 21, 1994, the Department filed the following documents with the Chief Administrative Law Judge:

- (a) a copy of the proposed rules certified by the Revisor of Statutes;
- (b) the Order for Hearing;
- (c) the Notice of Hearing proposed to be issued; and
- (d) an estimate of the number of persons who would attend the hearing and how long the hearing is expected to last.

3. On October 13, 1994, the Department mailed the Notice of Hearing to all persons and associations who had registered their names with the Department for the purpose of receiving such notice and the persons who appear on the list, filed on October 7, 1994, of additional persons to receive the Notice of Hearing.

4. On October 24, 1994, the Notice of Hearing and the proposed rules were published at 19 State Register 857.

5. On November 2, 1994, the Department filed the following documents with the Administrative Law Judge:

- (a) the Notice of Hearing as mailed;
- (b) a copy of the State Register pages containing the Notice of Hearing and its proposed rules;
- (c) the names of agency personnel and witnesses called by the Department to testify at the hearing;
- (d) the Department's certification that its mailing list was accurate and complete as of October 4, 1994;
- (e) the Affidavit of Mailing the Notice to all persons on the Department's mailing list; and,
- (f) the Affidavit of Additional Mailing.

6. No Notice of Solicitation of Outside Materials was published for these rules. The rulemaking was initiated by statute and no outside opinion was solicited.

Task Force on Special Education.

7. In 1993, the Legislature established a Task Force to review existing rules on special education. Laws of Minnesota 1993, Chap. 224, Art. 3, Sec. 35. Membership on the Task Force was limited to fifteen persons, at least 10 of whom must be parents of children with disabilities or members of advocacy groups. At least one member must be a student with a disability. The goals for the Task Force are proposals to reduce administrative burdens on classroom teachers, improve access to the system for students, assure outcome-based education without impairing due process rights, eliminate duplication, and expressly state outcomes for the special education system. The Task Force issued a report in January, 1994. The report made

Nature of the Proposed Rules and Statutory Authority.

7. Special education for students with disabilities is provided under Minn. Stat. § **120.17**. The Minnesota State Board of Education is authorized to adopt rules governing special education by Minn. Stat. § 120.17.

Act (Medicaid) to pay for that care. Under Minn. Stat. § 256B.04, subd. 4, must cooperate with the U.S. Department of Health and Human Services (DHHS) to qualify for federal funds. Under Minn. Stat. § 256B.04, subd. 15(1), the Department must establish programs to protect against "unnecessary or inappropriate use of medical assistance services." The Department is authorized to adopt rules to carry out its statutory obligations by Minn. Stat. § 256B.04, subd. 2. The proposed rules define terms to be used in administering eyeglass services under Medicaid. The rules establish what services and persons are covered under that program. The Administrative Law Judge concludes that DHS has general statutory authority to adopt these rules.

Small Business Considerations in Rulemaking.

6. Minn. Stat. § 14.115, subd. 2, provides that state agencies proposing rules affecting small businesses must consider methods for reducing adverse impact on those businesses. In its Notice of Hearing, DHS maintained that the proposed rules fall within the exemption set forth at Minn. Stat. § 14.115, subd. 7(2) and (3) for rules relating to medical programs regulated for standards and costs. The eyeglass services governed by the proposed rules are regulated for both standards and costs. DHS has met the requirements of Minn. Stat. § 14.115, subd. 2.

Fiscal Notice.

7. Minn. Stat. § 14.11, subd. 1, requires the preparation of a fiscal notice when the adoption of a rule will result in the expenditure of public funds in excess of \$100,000 per year by local public bodies. The notice must include an estimate of the total cost to local public bodies for a two-year period. The proposed rules govern the expenditure of state and federal money administered by the counties. The Department prepared a fiscal note in which DHS identified the rule as fiscally neutral, requiring no additional spending by counties. The expectation of the Department was that state expenditures would go down by \$19,931 in each of the first two years following adoption of the rules. Due to modifications proposed by the Department at the hearing, amount of cost reduction will not be as great as anticipated in the fiscal note.

Anne Henry, Attorney for the Minnesota Disability Law Center (MDLC), objected to the fiscal note as being inaccurate, since the rule modification would have a fiscal impact. MDLC requested that a new fiscal note be prepared to indicate the affect of the rules as modified. The fiscal note requirement arises when the rules would increase costs to "local public bodies." Costs incurred by the State are not costs to local public bodies. There is no evidence that the proposed modifications would shift any costs to the counties. The proposed rules will not require expenditures by local governmental units or school districts in excess of \$100,000 in either of the two years immediately following adoption, and thus no notice is statutorily required. There is no statutory basis to require the Department to prepare a new fiscal note.

Impact on Agricultural Land.

8. Minn. Stat. § 14.11, subd. 2 (1988), imposes additional statutory notice requirements when rules are proposed that have a "direct and substantial adverse impact on agricultural land in the state." The statutory requirements referred to are found in Minn. Stat. §§ 17.80 to 17.84. The proposed rules will have no substantial adverse impact on agricultural land within the meaning of Minn. Stat. § 14.11, subd. 2 (1988).

Proposed Rule 9505.0277 - Eyeglass Services.

9. Proposed rule 9505.0277 is comprised of three subparts. Subpart 1 establishes definitions to be used for the rule part. Subpart 2 indicates which services are covered under this rule part. Subpart 3 lists services not covered. Covered services are paid for by the Medicaid program. Only portions of the rules which require discussion or generated public comment will be

discussed in this Report. The remainder of the rules is found to be needed and reasonable. Any modification to the rules as published in the State Register not discussed in this Report is found to be not a substantial change.

Subpart 1 - Definitions.

10. Subpart 1 contains 9 items, each defining a term used in these rules. Only the terms requiring discussion will be mentioned in this Report. The other definitions are found to be needed and reasonable.

Item A - Comprehensive Vision Examination

11. Item A defines "comprehensive vision examination" as "a complete evaluation of the visual system." MDLC questioned the difference between "comprehensive vision examination" and "intermediate examination" (defined in item E). Proposed item A defines "comprehensive vision examination" as "a complete evaluation of the visual system." In contrast, item E defines "intermediate visual examination" as "an evaluation of a specific visual problem." The difference between the two was important under the original approach of the rules, because comprehensive vision examinations were limited to one every two years and intermediate vision examinations were not limited in that fashion. The Department has proposed to remove the time limitation from comprehensive vision examinations. Nevertheless, retaining the two definitions is useful to indicate what services fall under the items listed as covered eyeglass services under subpart 2. Items A and E are needed and reasonable as proposed.

Item F - Medically Necessary Eyeglasses

12. The Department defines "medically necessary eyeglasses" for the initial prescription of eyeglasses and for subsequent pairs of glasses. Item F(1) requires a person need a correction of .50 diopters or more in either sphere or cylinder power of the eye to meet the definition for the initial prescription of glasses. As originally proposed, item F(2) required a change of .50 diopters in either sphere or cylinder power of the eye (as measured by the refracting power of the lens) for "replacement eyeglasses."

MDLC suggested using the term "changed prescription" to describe the eyeglasses in item F(2). The commentator also suggested adding a subitem to expressly include "identical replacement eyeglasses," since that term is used in other portions of the rule. The Department agreed with MDLC on eyeglasses with new prescriptions. New language is proposed to substitute "a change in eyeglasses" for "replacement eyeglasses." The item, as modified, is needed and reasonable. The new language is not a substantial change.

Subpart 2 - Covered Eyeglass Services.

13. Proposed subpart 2 of the proposed rules lists what services are covered under the Medical Assistance program. The subpart was originally comprised of three items: comprehensive vision examinations, intermediate vision examinations, and medically necessary eyeglasses. At the hearing, the Department proposed changing the opening language of the subpart to clarify that the listed services were, in fact, eligible for Medical Assistance payment without meeting other requirements. No one objected to the change. The

opening language of the subpart is needed and reasonable, as modified. The wording is not a substantial change.

Item A - Comprehensive Vision Examination

14. As originally proposed, item A provided that one comprehensive vision examination per twenty-four month period is covered under Medical Assistance; MDLC; Roy Harley, Vice President for Disability Services, Lutheran Social Services (Lutheran Social Services); Jacki McCormack, Director of Programs and Child Advocacy of Arc Ramsey County (ARC), Julie Hanson,

Executive Director of Houston County Group Homes, Inc.; objected to the limitation on the frequency of comprehensive examinations. Drs. C. Gail Summers, Wayne B. Hines, and Rene W. Pelletier submitted examples of situations that cause patients to need comprehensive examinations more frequently than once every twenty-four months. MDLC asserted that 42 U.S.C. § 1396d(r)(2)(A(ii)) requires that some services must be provided more frequently than the proposed twenty-four month limit. MDLC Comment, at 1-2. To conform the rule to its interpretation of the law, MDLC suggested adding "unless more frequent comprehensive exams are medically necessary." Thus, a patient would be entitled to one comprehensive examination every twenty-four months without demonstrating any particular need. For any comprehensive examination on a more frequent basis, the standard of medical necessity must be met.

Based on the comments received, the Department modified item A to delete the proposed frequency limitation on comprehensive examinations. The Department chose to rely upon the standard of medical necessity which is required of all services provided under Medical Assistance. While the Department considered requiring prior authorizations for additional comprehensive examinations, but the cost of such a restriction could outweigh any cost savings to Medical Assistance. Requiring any comprehensive examination be "medically necessary" essentially makes the system self-policing. Item A, as modified, is needed and reasonable. The new language is not a substantial change.

Item B - Intermediate Vision Examination

15. As originally proposed, intermediate vision examinations were limited to one every twelve months by item B. Based on comments received from Dr. M. Odland, Chair of the Governor's Planning Council on Developmental Disabilities, the Department deleted the frequency requirement at the hearing on this matter. The modification is identical to that in item A. For the same reasons, the modified item B is needed, reasonable, and not a substantial change.

Item C - Medically Necessary Eyeglasses

16. Originally, item C made eligible one pair of medically necessary eyeglasses, one identical replacement pair of eyeglasses within a twenty-four month period if the original is lost, stolen, or irreparably damaged, and one identical replacement pair of eyeglasses due to a change in head size, vision, or allergic reaction to the material of the eyeglasses. This provision was criticized by Roy Harley, Vice President of Disability Services for Lutheran Social Services; Cindy Larson, a Supportive Living Coordinator; ARC; Stephen Harner, M.D.; JoAnn Bokovoy; Arla Oftelie, R.N., Director of Health Services

for Mount Olivet Rolling Acres; and Sandra L. Singer, Program Director, and Diane Greig, R.N., Health Services Coordinator, both of the Oakwood Residence. The commentators objected to the limitations as denying improved vision to persons for insufficient reasons.

Based on the comments, at the hearing the Department altered item C by separating the elements of the item and altering the standards applied. The new item C lists an initial pair of medically necessary eyeglasses as eligible for payment under Medical Assistance. Item D makes eligible "a pair of eyeglasses that are an identical replacement of a pair of eyeglasses that w

misplaced, stolen, or irreparably damaged." Item E retains the allowance of change of eyeglasses due to head size, vision, or allergic reaction, but adds the limitation that the change must be medically necessary.

Dr. Odland suggested eliminating some of the restrictions on replacement eyeglasses and ensure the system is not abused by requiring prior approval. Several other commentators supported the prior approval system. Oftelie urged improving the efficiency of the prior approval method now used by the Department. In proposing changes to the rule, the Department reviewed its records on replacement eyeglasses. Over a two-year period, the Department found that 164 recipients received two or more pairs of replacement eyeglasses. Department Modifications, at 2-3. Almost half of those recipients were under age 21. *Id.* The Department estimates that administrative costs to obtain prior authorization would exceed the costs of supplying the replacement eyeglasses. *Id.* The changes to item C and the addition of items D and E are needed and reasonable. The concerns of the commentators, that persons will be denied vision services for reasons beyond their control, have been met by the changes to the proposed rule. The changes do not constitute a substantial change.

Subpart 3 - Excluded Services

17. Proposed subpart 3 lists the services that are expressly excluded from coverage under Medical Assistance. The subpart is comprised of fourteen items, each listing a particular aspect of vision services. Most of the listed items are cosmetic or otherwise not necessary. The only excluded service that received any comment was item C and the exclusion of photochromatic lenses. MDLC and Drs. Roach and Odland asserted that conditions exist that would render photochromatic lenses to be medically necessary. ARC pointed out that the existing rule renders some tints and photochromatic lenses eligible for payment under Medical Assistance. MDLC supported making prescription sunglasses, or photochromatic tints that would serve as sunglasses, eligible under the rule. The Department removed photochromatic lenses from item C and added a new provision, item O.

Item O excludes photochromatic lenses except in the case of various listed conditions. The Department supported the change as meeting the needs of patients. Department Comment, at 5. The change is consistent with the Department's need to restrict services to that which is medically necessary based on the patient's condition.

In its reply, the Department noted that its list of allowed conditions for item O might not be complete. To ensure that no one is denied an appropriate service, the Department further modified the list of conditions to add "or a

other condition for which such lenses are medically necessary." Department Five-Day Responses to Comments, at 1. Item O is needed and reasonable to a services that are medically necessary while not incurring undue costs. The language is not a substantial change.

Content of SONAR

18. MDLC objected to parts of the Department's SONAR as inaccurate and inconsistent with the rule as proposed at the hearing. Several parts of the

SONAR were proposed for deletion. MDLC asserted that the deletions should be made to protect the rulemaking record from misinterpretation in the event that the SONAR is later cited to support the rule. The Department objected to the MDLC's request and refused to amend the SONAR for that purpose.

Throughout the rulemaking process, modifications to the proposed rules were encouraged. See Conclusion 7, below. When modifications are made, the new rule must be supported by affirmative facts showing the rule to be needed and reasonable. Minn. Stat. § 14.14, subd. 2. As a result of the modification process, statements made to support the prior rule are often rendered inoperative. Nevertheless, the SONAR, objections to the contents of the SONAR, and this Report discussing the SONAR are part of the rulemaking record. Minn. Rule 1400.0900. Any attempt to rely upon inoperative portions of the SONAR should be readily discounted due to the inconsistency between the adopted rule and the SONAR. The Administrative Law Judge lacks authority to alter the rulemaking record.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Minnesota Department of Human Services (DHS) gave proper notice of this rulemaking hearing.

2. DHS has substantially fulfilled the procedural requirements of Minn. Stat. §§ 14.14, subds. 1, 1a and 14.14, subd. 2, and all other procedural requirements of law or rule so as to allow it to adopt the proposed rules.

3. DHS has demonstrated its statutory authority to adopt the proposed rules, and has fulfilled all other substantive requirements of law or rule within the meaning of Minn. Stat. §§ 14.05, subd. 1, 14.15, subd. 3 and 14.50 (i) and (ii).

4. DHS has demonstrated the need for and reasonableness of the proposed rules by an affirmative presentation of facts in the record within the meaning of Minn. Stat. §§ 14.14, subd. 2 and 14.50 (iii).

5. The additions and amendments to the proposed rules which were suggested by DHS after publication of the proposed rules in the State Register do not result in rules which are substantially different from the proposed rules as published in the State Register within the meaning of Minn. Stat. §§ 14.15, subd. 3, and Minn. Rule 1400.1000, subp. 1 and 1400.1100.

6. Any Findings which might properly be termed Conclusions and any Conclusions which might properly be termed Findings are hereby adopted as such.

7. A finding or conclusion of need and reasonableness in regard to any particular rule subsection does not preclude and should not discourage DHS from further modification of the proposed rules based upon an examination of the public comments, provided that no substantial change is made from the proposed rules as originally published, and provided that the rule finally adopted is based upon facts appearing in this rule hearing record.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS HEREBY RECOMMENDED that the proposed rules be adopted.

Dated this _____ day of December, 1994.

BARBARA L. NEILSON
Administrative Law Judge

Reported: Taped, No Transcript Prepared

